

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 24TH JANUARY 2007 / 4TH MAGHA 1928

Crl.MC.No. 198 of 2007()

CRRP.26/2005 of SESSIONS COURT, KASARAGOD
CC.638/2003 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD
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PETITIONER: ACCUSED

C.H.SALEEM, S/O.C.H.MOHAMMED,
RESIDING OLD JUMA MASJID ROAD, CHOORI,
R.D.NAGAR P.O., KASARGODE DISTRICT.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT / STATE

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1. HEMALATHA, W/O.LAE K.P.ANANDA,
RESIDING AT SAINATH MANDIR, HONNAMOOLE,
KASARAGODE 67 1121.
 2. STATE REP.BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SMT. LATHA

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 24/01/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

R. BASANT, J.

Crl.M.C.No. 198 of 2007

Dated this the 24th day of January, 2007

ORDER

The petitioner is the accused in a prosecution under Section 138 of the N.I. Act. Cognizance was taken on the basis of a complaint filed by the first respondent herein. Process was issued to the accused. The accused had not entered appearance. On a day when the case was posted for appearance of the accused, the complainant was absent. He was represented by his counsel. The learned Magistrate, on the ground that the complainant is not present, proceeded to pass an order dismissing the complaint under Section 256 Cr.P.C.

2. That order was challenged by the complainant in revision before the learned Sessions Judge. The learned Sessions Judge, by the impugned order, took the view that insistence on the personal appearance of the complainant was unnecessary on the date when the order under Section 256 Cr.P.C. was passed. Accordingly the learned Sessions Judge set aside the order of acquittal passed under Section

256 Cr.P.C. and directed the learned Magistrate to dispose of the complaint afresh.

3. The learned Magistrate has now taken up the matter again. Consequent to the non-appearance, a non-bailable warrant was issued against the petitioner. He is employed abroad. He has not been able to appear before the Magistrate. He is returning from his place of employment now. The petitioner apprehends that he will be arrested in execution of the non-bailable warrant issued by the learned Magistrate. In these circumstances he prays that direction under Section 482 Cr.P.C. may be issued to quash the proceedings, which is now pending against him.

4. The learned counsel for the petitioner points out that an order of acquittal under Section 256 Cr.P.C. is one which can be challenged under Section 378 Cr.P.C. by instituting a proper appeal after securing the requisite leave under Section 378(4) Cr.P.C. It is not an order which is subject to the revisional jurisdiction of the court. A revision is specifically barred in view of Section 401(4) Cr.P.C. Where a person has a right of appeal a revision at the instance of such person is specifically proscribed under Section 401(4) Cr.P.C. An illegality/irregularity has thus

been committed by the learned Sessions Judge in entertaining a revision at the instance of the complainant, who could have preferred an appeal against the judgment of acquittal under Section 378 Cr.P.C. In these circumstances, the learned counsel for the petitioner prays that Annex.I order passed by the revisional court may be set aside as one without jurisdiction.

5. Technically the contention of the learned counsel for the petitioner is absolutely justified. An order of acquittal under Section 256 Cr.P.C., it is now trite, is an appealable order under Section 378 Cr.P.C. Consequently a revision by a complainant, who could have preferred an appeal, cannot be entertained under Section 401(4) Cr.P.C.

6. The only question to be considered is whether the error/inadequacy in the revisional order is such that it should persuade this court to invoke the powers under Section 482 Cr.P.C. It is by now trite that any and every error/inadequacy in an order/proceedings of the subordinate court cannot ipso facto justify the invocation of the powers under Section 482 Cr.P.C. Has justice failed? Is there miscarriage of justice? These are the crucial questions which a court has to consider when it is called upon to invoke the powers under Section 482 Cr.P.C.

7. In the instant case, I do note that the petitioner had not appeared before the learned Magistrate when the order under Section 256 Cr.P.C. was passed. I do further note that on that specific date the appearance of the complainant was totally unnecessary as the case was posted for appearance of the accused. The order of the learned Sessions Judge shows that the dismissal under Section 256 Cr.P.C. was passed notwithstanding the representation of the complainant by his counsel. In these circumstances it cannot be held that there is any failure of justice in the conclusion reached by the revisional court that invocation of the powers under Section 256(1) to dismiss the complaint and acquit the accused for absence of the complainant was not correct.

8. The only imperfection in the impugned order is that the revision petition was entertained at the instance of the complainant in violation of the mandate of Section 401(4) Cr.P.C. If the court had suo moto taken the revision, the bar under Section 401(4) Cr.P.C. would not obviously apply. I have already noted that the order passed by the revisional court is one which eminently advances the interests of justice. In these circumstances, I am satisfied that reckoned as an order passed in a revision initiated suo moto the order passed in the revision is not wrong, incorrect or unjust.

9. I am satisfied in these facts and circumstances that this is an eminently fit case where notwithstanding the inadequacy/irregularity in the impugned order, the order does not deserve to be interfered with by invoking the jurisdiction under Section 482 Cr.P.C. Inherent powers are to be invoked only when justice fails or is miscarried. In the instant case I am convinced that the order eminently advances the interests of justice and therefore I am of the opinion that this is a fit case where such powers need not be invoked.

10. The learned counsel for the petitioner then submits that the petitioner was employed abroad and that there was no contumacious laches on his part in not appearing before the learned Magistrate. It is certainly for the petitioner to appear before the learned Magistrate and seek bail in the regular and ordinary course. In the facts and circumstances of this case, I am satisfied that there is absolutely no necessity to order pre-trial detention of the petitioner. I do not find any reason why the learned Magistrate should not consider the application for bail to be filed by the petitioner on merits in accordance with law, expeditiously and favourably too. In the peculiar facts and circumstances of this case there can be a positive direction issued to the petitioner to appear before the learned Magistrate on

5.2.2007. He shall be released on bail on appropriate conditions by the learned Magistrate. The warrant of arrest issued against the petitioner shall not be executed till 5.2.2007.

(R. BASANT)
Judge

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